GRANTED

(10)

No. 02-1377

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IN THE

Supreme Court of the United States

BUCK DOE,

Petitioner,

v.

ELAINE L. CHAO, SECRETARY OF LABOR,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

DONALD B. AYER
JACK W. CAMPBELL IV
(*Counsel of Record*)
DOMINICK V. FREDA
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001-2113
(202) 879-3939

JOSEPH E. WOLFE
TERRY G. KILGORE
WOLFE, WILLIAMS
& RUTHERFORD
470 Park Avenue
Norton, VA 24273-0625
(276) 679-0777

Counsel for Petitioner

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REPLY BRIEF FOR PETITIONER

Petitioner demonstrated in his opening brief that Section 552a(g)(4) of the Privacy Act awards $1,000 statutory damages to an individual who has proven an "adverse effect" caused by a federal agency's "intentional or willful" failure to comply with the Act. This award is not conditioned on the individual's quantifying harm in terms of "actual damages." The Privacy Act's plain text, structure, context, purpose, history, and relevant administrative guidance compel this interpretation. The government does not cast any reasonable doubt on this showing. In fact, much of the government's response proceeds from mischaracterizations of Petitioner's arguments.

1. **Accepting Petitioner's interpretation of the Privacy Act would not create an "automatic" remedy that is unconnected to any "actual harm."** The government attempts to deflect attention from the analytical weaknesses in its position by repeatedly urging that acceptance of Petitioner's interpretation of the Privacy Act would create a radical "automatic" remedy unconnected to any "actual harm."[1] This assertion is untrue.

There is nothing "automatic" about a $1,000 statutory damages award under Petitioner's interpretation of the Act. Plaintiffs complaining of a wrongful disclosure must, in every case, prove an "adverse effect" caused by a violation of the Act. They must also, in every case, prove that the statutory violation was "intentional or willful" — a barrier that Congress and commentators agree is a formidable obstacle to recovery under the Act. *See* Pet. Br. 29.

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[1] *See* Resp. Br. 9, 10, 12, 13, 14, 15, 16, 17, 22 n.5, 25, 26, 27, 29, 34, 35, 44, 47 (asserting that Petitioner seeks "automatic" damages awards); *id.* at 22, 26, 35, 36, 40, 42 (asserting that Petitioner seeks damages awards unconnected to "actual harm").

It is also untrue that Petitioner's interpretation of the Act would award $1,000 to plaintiffs who have suffered no "actual harm." The government is strategically conflating two separate ideas — "actual harm" and "actual damages." "Because harm differs from damages in nature as well as in amount, the term damages is best reserved for the claim or the remedy rather than for the underlying loss or injury." 1 D. Dobbs, *Law of Remedies* § 3.1 (2d ed. 1993). As this Court has held in the context of defamation claims, "[s]uffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted . . . include . . . personal humiliation, and mental anguish and suffering." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). Precisely the same is true of privacy invasions caused by public disclosure of private facts. *See* D. Elder, *The Law of Privacy* § 3:7 (1991) ("Clearly, the protected interest in public disclosure cases is that of reputation, with the same overtones of mental distress that are present in libel and slander . . . .") (citation omitted). *Accord Time, Inc. v. Hill*, 385 U.S. 374, 384 n.9 (1967); 2 Dobbs, *supra*, § 7.1.1.

Every person who files a Privacy Act suit for wrongful disclosure must prove "actual harm." He must demonstrate that he suffered an "adverse effect," which, in the great majority of cases, is likely to be emotional distress. *See* Pet. Br. 27-28, 31-32. To be sure, it is often difficult to quantify this harm in the monetary terms of "actual damages." *See* Pet. Br. 28 & n.6. But difficulty in quantification does not mean that "actual harm" has not been suffered.

In sum, there is nothing radical about an interpretation of the Privacy Act that awards the relatively meager sum of $1,000 to a person who has suffered real harm (an "adverse effect") as a result of an agency's "intentional or willful" violation of federal law.

2. **The United States has clearly waived its immunity to a $1,000 statutory damages remedy under the Privacy Act.** It is telling that the government's primary argument is not that its interpretation of the Privacy Act is the correct one, but rather that this Court should strain to accept that interpretation in service to a sovereign immunity canon of construction. This argument fails for two reasons.

a. *First*, the sovereign immunity canon is not a license to give a statute a strained reading. *See* Pet. Br. 23-24. A rule of strict construction is not a rule of first resort. It is a means of resolving residual ambiguity once ordinary interpretive guides have yielded no definitive conclusion. *See Citizens' Bank v. Parker*, 192 U.S. 73, 85-86 (1904) (a rule of strict construction "is not a substitute for all other rules"; it is "to be an element in decision, and effective, maybe, when all other tests of meaning have been employed which experience has afforded, and which it is the duty of courts to consider when rights are claimed under statute"). *Accord, e.g.*, 3 N. Singer, *Sutherland Statutory Construction*, § 58:2 (6th ed. 2001); T. Sedgwick, *The Interpretation and Construction of Statutory and Constitutional Law* 218-19 (2d ed. 1874). Thus, the fact that a statute waives the United States' sovereign immunity does not mean that the Court should ignore rules of construction like giving words their plain meaning, ensuring that each word of a statute is given effect, and interpreting a statute as a whole. As demonstrated in Petitioner's opening brief and again below, the government's interpretation of the Privacy Act violates these most basic rules.

b. *Second*, the question in this case is not whether the United States has waived its immunity to a $1,000 statutory damages remedy. It plainly has done so. The question is whether a Privacy Act plaintiff must quantify some measure of actual damages to receive the $1,000. The sovereign immunity canon of construction does not reach down to govern this subsidiary question of the Act's operation and

administration. To the contrary, the Court will not "thwart[]" the waiver of immunity with an "unduly restrictive interpretation." *Canadian Aviator, Ltd. v. United States*, 324 U.S. 215, 222 (1945). *See* Pet. Br. 25-26.

The government's case law does not suggest anything to the contrary. In each case, the Court unremarkably refused to find the United States subject to a remedy that a statute's plain text, structure, and context did not create. *See Price v. United States*, 174 U.S. 373, 376-77 (1899) (refusing to allow damages for property that the claimant admitted was "not taken or destroyed" by Indians based on a statute that expressly limited the United States' liability to damages for property "taken or destroyed" by Indians); *United States Dep't of Energy v. Ohio*, 503 U.S. 607, 616-26 (1992) (United States not liable for punitive fines under the Clean Water Act or Resource Conservation Recovery Act where neither plain text nor structure nor context of the Acts created such liability); *Missouri Pac. R. Co. v. Ault*, 256 U.S. 554, 563 (1921) (United States not liable for penalties imposed under Arkansas railroad workers law where there was "nothing either in the purpose or the letter" of the federal statute governing railroad takeover "to indicate Congress intended to authorize suit against the government for a penalty"); *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 682, 693-94 (1983) (United States not liable for attorneys' fees under the Clean Air Act where a party "achieved no success on the merits of its claims"; Court refused a "radical departure from established principles requiring that a fee claimant attain some success on the merits before it may receive an award of fees").

3. **The government's textual arguments fail at every turn.** Section 552a(g)(4)(A) provides for liability in the amount of "actual damages sustained as a result of the [government's] refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000 . . . ." The government argues that this language "confine[s] the

remedy available to aggrieved individuals to 'actual damages.'" Resp. Br. 26. But this "confining" characterization only begs the question of whether quantification of "actual damages" is a precondition to recovery of $1,000 statutory damages. And the government's attempts to answer this question in the affirmative fail at every turn.

a. The most fundamental flaw in the government's position is that it renders the "adverse effect" element of the Privacy Act superfluous. This is almost certainly the reason that the government has restated the question presented to eliminate any reference to the "adverse effect" requirement and has studiously avoided mention of that requirement when inaccurately characterizing Petitioner's argument as seeking "automatic" damages awards that are unconnected to "actual harm." *See supra* pp. 1-2.

The government ascribes a standing function to the "adverse effect" requirement. Resp. 36-37. Petitioner agrees that, as an essential element of a Section 552a(g)(4) claim, the "adverse effect" requirement serves a standing function. But if the government's interpretation of the Act is accepted, that requirement becomes superfluous. This is so because the government's central contention is that proof of "actual damages" is a necessary claim element. Thus, to survive a motion to dismiss, a plaintiff would have to allege sufficient facts to support a claim for "actual damages." Supportable allegations of this sort would necessarily satisfy the standing doctrine's "distinct and palpable" injury, "causation," and "redressability" requirements. *See Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). The "injury in fact" and "causation" functions that the government attributes to the "adverse effect" requirement (Resp. Br. 37) would be subsumed in every case by the need to allege, and ultimately prove, "actual damages." *See* Pet. Br. 17.

Moreover, the government's position fails to answer the fundamental question of why Congress would grant standing to bring suit under the Act to an individual who suffers an "adverse effect" caused by an "intentional or willful" violation, yet provide no remedy for that injury. Unable to offer an answer, the government instead asserts (Resp. Br. 38-39 & n.13) that, in such circumstances, the plaintiff could bring an action for injunctive relief under the Administrative Procedure Act. This is no answer for two reasons.

First, once an individual's private information has been wrongfully disclosed, the harm is done. An injunction forbidding an agency from redisclosing the private information in the future would be a singularly ineffective remedy for that harm. *See White v. Sparkill Realty Corp.*, 280 U.S. 500, 510 (1930) ("injunction . . . ceased to be appropriate" where "all alleged wrongful acts . . . had been consummated long before suit was brought"); 42 Am. Jur. 2d *Injunctions* § 2 (2000) ("[R]ights already lost and wrongs already perpetrated cannot be corrected by injunction.").

Second, there is no independent APA claim for a Privacy Act disclosure violation. As courts repeatedly have held, Section 552(a)(g)(4) provides the exclusive remedies for a wrongful disclosure of private information by a federal agency, and injunctive relief is not one of them.[2] The APA confers no "authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is

[2] *See, e.g., Hastings v. Judicial Conference of the U.S.*, 770 F.2d 1093, 1104 (D.C. Cir. 1985); *Cell Assocs., Inc. v. NIH*, 579 F.2d 1155,1159 (9th Cir. 1978); *Parks v. IRS*, 618 F.2d 677, 684 (10th Cir. 1980); *Hanley v. United States Dep't of Justice*, 623 F.2d 1138, 1139 (6th Cir. 1980); *Clarkson v. IRS*, 678 F.2d 1368, 1375 n.11 (11th Cir. 1982). *See generally National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974) ("[W]hen legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies.").

sought." 5 U.S.C. § 702; *see id.* § 704 (APA allows review of an agency action only where "there is no other adequate remedy in a court."). Accordingly, a plaintiff cannot bring a claim under the APA for what is, in reality, a Privacy Act disclosure violation. *See, e.g., Tripp v. Department of Defense*, 193 F. Supp. 2d 229, 238 (D.D.C. 2002); *Schaeuble v. Reno*, 87 F. Supp. 2d 383, 394 (D.N.J. 2000); *Mittleman v. United States Treasury*, 773 F. Supp. 442, 449 (D.D.C. 1991).[3]

b. The Privacy Act states that the United States "shall be liable" to a Privacy Act plaintiff who proves an "adverse effect" caused by an "intentional or willful" violation. *See* Pet. Br. 14-15. The government counters that "[i]f the Act had simply provided that 'an agency that commits an intentional or willful violation shall be liable for actual damages,'" then Petitioner could not "argue that the unavailability of any monetary award in cases where no actual damages were shown would somehow subvert Congress's determination that the agency 'shall be liable.'" Resp. Br. 36. The defect in this response is that Congress did not use the language that the government offers.

[3] The government states (Resp. Br. 38 & n.13) that the APA was "the basis" for an injunction against the Department in the district court below. This characterization is misleading. The Department voluntarily agreed to cease disclosing black-lung claimants' social security numbers shortly after Petitioner filed suit, and the district court entered a consent order embodying that agreement. *See* JA 12-13. The Department later sought to renege, claiming that the district court lacked jurisdiction to enforce the agreement. In rejecting the Department's arguments, the district court discussed the APA as a "proper consideration" in its enforcement power. Op. of March 18, 1998 at 10. Ultimately, however, the district court held that its power to enter and enforce the consent order stemmed from "the Department's own conduct in this case." *Id.* at 14. *See United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 238 (1975) ("[A] consent decree or order is to be construed for enforcement purposes basically as a contract . . . .").

Congress instead provided that "the United States shall be liable to the individual *in an amount equal to the sum of*" the figures obtained from operation of Sections 552a(g)(4)(A) and (B). (emphasis added). This is language of measurement and arithmetic, not language creating an additional element of a cause of action. The government's insistence that "actual damages" is an essential element of liability under Section 552a(g)(4) — despite its being set off from the elements of liability in the Act's civil remedies provisions and preceded by mandatory language imposing liability — is nonsensical. Why would Congress have used the "amount equal to the sum of" phraseology if it expected that the "sum" would frequently be zero? As the government itself suggests, it would have been far simpler to say that the United States "shall be liable for actual damages."

Finally, the government does not dispute Petitioner's showing (Pet. Br. 32) that proof of actual damages is not an essential element of common-law intentional torts generally or privacy torts specifically. Thus, it should come as no surprise that Congress similarly would not make proof of actual damages an essential element of a claim for an "intentional or willful" Privacy Act violation.

c. The government does not dispute that an entitlement to "recovery" is far broader than an entitlement to "actual damages." Pet. Br. 15-16. Instead, the government contends (Resp. Br. 26-27) that a "person entitled to recovery" cannot be one receiving an "automatic" $1,000 statutory damages award in the absence of proof of "actual damages" because this would be a "free-standing award of money," and thus not a "recovery" of anything that had been lost. This argument is wrong in its own terms. It depends entirely on the government's assertion that Petitioner seeks to make the Act's $1,000 statutory damages "automatic" and unconnected to any "actual harm." As shown above, this assertion is false. The statutory damages award compensates for a real harm suffered

— *i.e.*, the "adverse effect," which, as in privacy violations of all types, is typically emotional distress. See Pet. Br. 17-18, 27. It is thus a "recovery" as the government defines the term.

The government's argument is also premised on an incorrect definition of "recovery." The government does not refute the common legal definitions of "recovery" set forth in Petitioner's brief. Pet. Br. 15-16 & n.4. Those definitions are not limited to "getting back" something taken away. Rep. Br. 26. They include: the "obtaining of a thing by the judgment of a court" (*Black's Law Dictionary* 1276 (6th ed. 1990)); "the establishment of a right by the judgment of a court" (S. Gifis, *Dictionary of Legal Terms* 369 (2d ed. 1993)); "to get back *or gain* by judgement in a court of law" (*The Oxford English Dictionary* 1367 (2d ed. 1989) (emphasis added)). Thus even a "free-standing award of money" (Resp. Br. 27 & n.7) would be a "recovery" in the law.

d. The government's only affirmative textual argument focuses entirely on Section 552a(g)(4)(A), to the exclusion of all surrounding provisions of the Act. The government contends that because the phrase "person entitled to recovery" appears for the "first and only time" in Section 552a(g)(4)(A) in the company of a reference to actual damages, it must "describe that particular class of individuals who have established some level of actual damages." Resp. Br. 28-29. Even putting aside the fact that this acontextual argument violates the "central tenet" that "a statute is to be considered in all its parts when construing any one of them" (*Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35-36 (1998)), the government has it exactly backward. Why would Congress have introduced the broader phrase "person entitled to recovery," and demarcated it from the first clause of Section 552a(g)(4)(A) with the adversative language "but in no case," if all it meant to do was refer to individuals who have quantified actual damages? If that were Congress' intent, it would have been far simpler to say "and no individual who has

proven actual damages shall receive less than the sum of $1,000."

The government asserts that Petitioner's interpretation of "person entitled to recovery" is "circular" because "it is precisely and only his purported eligibility for a $1000 award that makes him a 'person entitled to recovery.'" Resp. Br. 27. This is wrong. A Privacy Act plaintiff becomes a "person entitled to recovery" upon proving that a federal agency has committed a liability-imposing wrong — *i.e.*, has caused plaintiff an "adverse effect" as a result of an "intentional or willful" violation of the Act. As Petitioner pointed out in his opening brief, "questions concerning the proper measure of damages are 'no longer confused with a right of recovery' where 'a wrong has been done.'" Pet. Br. 15-16 (quoting *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 565-66 (1931)). Congress could have provided any number of recoveries for that wrong. The ones it selected were actual damages (for those plaintiffs who could quantify them), statutory damages of $1,000 (for those who could not), costs, and reasonable attorneys fees. Hence, the definition of "person entitled to recovery" is not dependent "only" on "eligibility for a $1000 award." Resp. Br. 27.

e. The government offers one affirmative contextual argument in support of its interpretation. It contends that because Sections 552a(g)(2) and (g)(3), which concern record correction and record access, do not provide for statutory damages, Section 552a(g)(4) should not be read to do so in the interest of "structural equity." Resp. Br. 35. To the extent that "structural equity" is a meaningful concept, there is ample reason why Section 552a(g)(2) and (g)(3) actions do not need a statutory damages remedy to make them effective, but Section 552a(g)(4) actions do.

First, Section 552a(g)(2) and (g)(3) actions do not require the plaintiff to demonstrate an "adverse effect." Thus, neither action is concerned with remedying harm. In contrast, a

Section 552a(g)(4) action requires the plaintiff to demonstrate, as an essential claim element, harm in the form of an "adverse effect." Because inherently difficult-to-quantify harms are the predominant ones where privacy violations are concerned (*see* Pet. Br. 16-18, 27-29), the availability of liquidated damages ensures a meaningful remedy in Section 552a(g)(4) actions. This remedy in turn provides incentive for citizen suits to enforce the Act, which deters future agency violations.

Second, a Section 552a(g)(4) action involves an "intentional or willful" violation of the Act. Section 552a(g)(2) and (g)(3) actions do not. Providing individuals with a particular incentive to bring suits for (and deter) "intentional or willful" agency violations of federal law makes good sense.

f. The government's effort (Resp. Br. 36) to explain the existence of Section 552a(g)(4)(A)'s $1,000 damages clause on the ground that it "simply eases or avoids quantification and other proof problems at trial" is directly at odds with the government's core assertion in this case, and proves Petitioner's point.

Quantification is the very essence of proving "actual damages." Thus, the court below accepted the government's argument that Petitioner's harm did not sound in "actual damages" precisely because he was unable to quantify his emotional distress in terms of costs like "medical and psychological treatment," "prescription medication," and "loss of income." Pet. App. 15a-16a. A Privacy Act plaintiff unable to quantify his harm in terms of "actual damages," therefore, is entitled to no recovery at all under the government's interpretation of the Act.

The government's concession that Section 552a(g)(4)(A)'s $1,000 damages clause is intended to "ease" or "avoid" proof problems proves Petitioner's point that it is, in fact, a liquidated damages clause. It is precisely where "a harm . . . would be difficult to quantify" that a "provision for liquidated

damages [is] highly appropriate." *Lawyer's Title Ins. Corp. v. Dearborn Title Co.*, 118 F.3d 1157, 1161 (7th Cir. 1997) (Posner, C.J.). *Accord Rex Trailer Co. v. United States*, 350 U.S. 148, 153 (1956) ("liquidated damages serve a particularly useful function when damages are uncertain in nature or amount or are unmeasurable") (internal quotation marks omitted); C. McCormick, *Damages* 604 (1935) (doctrine of "liquidated damages" developed in cases where harm was "incapable or very difficult of accurate estimation"). Congress placed Section 552a(g)(4)(A)'s $1,000 liquidated damages clause in the Privacy Act in recognition that the real, and typical, harms suffered as a result of a privacy violation are usually difficult to quantify, but nonetheless merit at least a limited recovery.

g. In summary, to make sense of the government's textual argument, the Court must read Section 552a(g)(4) as follows (words that must be ignored are crossed out; words that must be added are underlined):

> (4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States ~~shall~~ may be liable to the individual ~~in an amount equal to the sum of~~, but only if the individual also proves —
>
> (A) actual damages sustained as a result of the refusal or failure, ~~but~~ and ~~in no case shall a person entitled to recovery~~ an individual who has proven actual damages shall not receive less than the sum of $1,000; and
>
> (B) if the individual proves actual damages, the costs of the action together with reasonable attorney fees as determined by the court.

Any reading of the Privacy Act that requires this many implied insertions and deletions of language is not one that this Court should accept as plausible, much less compelling.[4]

4. **The government's citation to other statutes creating liquidated damages remedies only demonstrates that Congress has employed a number of verbal constructs to achieve the same result.** The government cites (Resp. Br. 30-32) seventeen federal statutes — each of which uses verbiage and structure that vary from the others to greater and lesser degrees, even within the supposed "categories" that the government purports to create — and admits that each of them clearly sets forth a statutory damages remedy that does not depend on quantification of actual damages. If these various statutes demonstrate anything, it is that Congress has employed several different constructs that achieve precisely the same result. This does not even suggest, much less compel, a holding that the Privacy Act's language should not be given its normal meaning. *See Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health and Human Res.*, 532 U.S. 598, 614-15 (2001) (Scalia J., concurring) ("[I]t would be no more rational to reject the normal reading of 'prevailing party' because some statutes produce the same result with different language than it would be to conclude that, since there are many synonyms for the word 'jump,' the word 'jump' must mean something else."). The language of Section 552a(g)(4) is plain, and it creates a statutory damages remedy that does not depend upon proof of actual damages.

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[4] In its opposition to certiorari (Opp. 9), the government suggested that there could be a class of "prevailing" individuals under the Privacy Act entitled to no damages recovery at all. See Pet. Rep. 5. That interpretation raised a potential Article III problem — namely, that there could be Privacy Act plaintiffs who could bring suit for attorneys' fees only. Pet. Br. 19. The government has now abandoned that argument in favor of its position that proof of actual damages is an essential element of a Privacy Act claim. Resp. Br. 39. While that position avoids an Article III problem, it only highlights the disconnect between the government's interpretation of the Privacy Act and the Act's text and structure.

The government's attempts to explain away the statutes cited by the Petitioner are similarly ineffectual. Section 2707(c) of the Electronic Communications Privacy Act ("ECPA") uses language materially identical to Section 552a(g)(4) to create a statutory damages remedy that does not depend on proof of actual damages. *See* Pet. Br. 22-23. The government does not argue that there is any significant language difference between ECPA Section 2707(c) and Privacy Act Section 552a(g)(4)(A). Instead, in a footnote, the government says that Section 2707(c) does not apply to the United States. Resp. Br. 34 n.11. This is not a valid ground of distinction.

As originally enacted in 1986, ECPA Section 2707(a) subjected the United States to suit, and thus to the statutory damages remedy in Section 2707(c). The government does not dispute Petitioner's showing that Congress clearly stated its intent that Section 2707(c) allow a $1,000 statutory damages award without quantification of actual damages. *See* Pet. Br. 22. It was not until 2001 that, as part of the USA-Patriot Act, Congress amended the ECPA to exclude the United States from the civil-suit provision. *See* Pub. L. No. 107-56 § 223(b), 115 Stat. 272, 293-94. And, prior to the 2001 amendment, at least one federal court held the United States liable for $1,000 statutory damages under Section 2707(c), even though the plaintiff could not quantify any "compensatory damages." *See Steve Jackson Games, Inc. v. United States Secret Serv.*, 816 F. Supp. 432, 443 (W.D. Tex. 1993), *aff'd*, 36 F.3d 457 (5th Cir. 1994).

The government derides Petitioner's example of Section 7217(c) of the Tax Reform Act because it was repealed and because it authorized suits against federal officials in their personal capacity. Resp. Br. 33. But the government does not (and cannot) dispute that Congress expressly stated its intent to create a statutory damages remedy that did not depend on quantifying actual damages: "[B]ecause of the difficulty in

establishing in monetary terms the damages sustained by a taxpayer as the result of the invasion of his privacy caused by an unlawful disclosure of his returns or return information, the amendment provides that these damages would, in no event, be less than liquidated damages of $1,000 for each disclosure." S. Rep. No. 94-938, at 348 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2897, 3778; *see* Pet. Br. 21. It is simply immaterial that this provision was repealed and that it spoke to liability of federal officials in their personal capacity. Congress employed materially identical language to that found in Section 552a(g)(4)(A) expressly to create a privacy-protective statutory damages remedy that did not depend on a showing of actual damages.

Indeed, if there could be any doubt that Section 7217(c)'s application to federal officials in their personal capacity does not affect the interpretation, one need only look to Section 6110(j)(2)(A) of the same statute, which makes the United States liable for "intentional[] or willful[]" tax-document privacy violations. In language identical in structure and materially identical in wording to that found in Section 7217(c) and the Privacy Act, Section 6110(j)(2)(A) creates a $1,000 statutory damages remedy that Congress expressly stated was independent of proof of actual damages. Pet. Br. 21-22. As with Section 7217(c), the government does not (and cannot) dispute Congress's intent with regard to this provision.

5. **Relevant legislative history confirms that Section 552a(g)(4)(A) contains a $1,000 liquidated damages provision**. The Privacy Act's $1,000 statutory damages provision emerged as a compromise between the Senate and the House. The Senate's express desire, shared by a number of House members, that the Act include a "liquidated damages" provision to be "assessed against the agency for a violation of the Act" was accommodated by Section 552a(g)(4)'s inclusion of the $1,000 damages clause along with the "actual damages" clause. Indeed, the government

concedes (Resp. Br. 42 n.15) that Section 552a(g)(4)(A)'s statutory damages clause was added "the next day" after the Senate Committee on Government Operations called for a liquidated damages provision. The House's countervailing concern that the government's liability be constrained by a strict culpability requirement was accommodated by making the United States' liability turn on a showing of "intentional or willful" conduct. *See* Pet. Br. 29-31.

The government contends, however, that because a few earlier bills dealing with privacy issues — none of which were the basis of the Privacy Act — mentioned "liquidated damages" and were not enacted, Section 552a(g)(4)(A) must not contain a liquidated damages provision. Resp. Br. 40-41, 44 n.18. There is no basis to draw such an inference. These bills differed in numerous and substantial ways from the bills that ultimately became the Privacy Act, and the bases for their rejection are unknown. Indeed, if these bills demonstrate anything, it is that Congress was well aware that a liquidated damages provision of some sort was necessary to make a privacy-protection statute effective. *See also* Br. of *Amici Curiae* Electronic Privacy Information Center, *et al.*, at 13-18.

The government also contends (Resp. Br. 43) that Congress delegated consideration of a liquidated damages remedy to the Privacy Protection Study Commission ("PPSC"). This is wrong. Congress charged the PPSC to determine whether the Privacy Act should be amended to include a "general damages" remedy. As the government acknowledges (Resp. Br. 42 n.15), just before final passage of the Act, the Senate bill provided for "actual and general damages sustained by any person, but in no case shall a person entitled to recovery receive less than the sum of $1,000." Only the "general damages" language was dropped in the final Act. The liquidated damages language expressly called for by the Senate was retained. Thus, Congress's submission of the "general damages" question to the PPSC may bear on the question

whether non-pecuniary emotional distress is encompassed within the term "actual damages" as used in the Privacy Act — a question that is also the subject of a split of authority among the federal courts of appeals, but that the parties agree is not directly presented in this case. That delegation, however, has no bearing on the interpretation of Section 552a(g)(4)(A)'s $1,000 statutory damages provision.[5]

6. **Petitioner's interpretation of the Privacy Act properly reflects Congress's balancing of the needs to protect privacy rights and to avoid excessive government liability.** The Privacy Act, as properly interpreted, reflects a careful balance by (i) providing a recovery for the dignitary harm and associated emotional distress of a privacy invasion (often the only harm associated with such a claim), which ensures that the Act encourages citizen suits to vindicate privacy rights and concomitantly deters agencies from violating the Act; and (ii) placing important checks on the United States' liability in the form of a strict "intentional or willful" culpability requirement and a $1,000 cap on the liquidated damages available when quantification of actual damages is impossible. Pet. Br. 27, 29-31.

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[5] The government's attempt to disavow relevant administrative guidance is also ineffective. The government asserts (Resp. Br. 47-48) that an unidentified official has stated that "OMB does not interpret its Guideline to require the payment of $1000 to plaintiffs" who cannot quantify "actual damages." This OMB "statement" is entitled to no consideration by this Court. There is no indication that the person who made it is in any position to issue authoritative statements of OMB policy. Moreover, this position is at best newly minted for litigation. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988). Finally, it is noteworthy that the OMB's longstanding interpretation of Section 552a(g)(4)(A) — "the United States will be required to pay . . . actual damages or $1,000, whichever is greater" (40 Fed. Reg. 28,948, 28,970 (1975)) — is materially identical to language the government itself offers as creating a clear entitlement to statutory damages that are not dependent on proof of actual damages — "actual damages *or* statutory damages of $1000, whichever is greater" (Resp. Br. 14).

The government's insistence that Petitioner's argument proceeds from a "single-minded focus on encouraging Privacy Act litigation, to the exclusion of the fiscal consequences attending the authorization of broad damages awards" (Resp. Br. 45), flatly misrepresents Petitioner's position. To the extent that the government's argument is an attempt to raise the specter of runaway liability (*see* Resp. Br. 22-23 & n.5), two responses are appropriate.

First, from the Privacy Act's effective date of January 1, 1975, to (at the earliest) 1997, when the Sixth Circuit decided *Hudson v. Reno*, 130 F.3d 1193 (6th Cir. 1997), *overruled in part*, *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001), the federal courts of appeals unanimously had held that Section 552a(g)(4)(A) authorizes a $1,000 statutory damages remedy that does not depend upon proof of actual damages. Yet, in those 22 years, the type of massive liability the government imagines never occurred. Surely, if the government's parade of horribles were going to happen, it would have happened before now.

Second, the government's fears about a $1,000 statutory damages award being available for every single wrongful disclosure and about class-action litigation are overstated. The D.C. Circuit held in *Tomasello v. Rubin*, 167 F.3d 612 (D.C. Cir. 1999), that the $1,000 statutory damages remedy is available for each act by an agency that violates the Act. But, the court held, aggregation of "several more-or-less contemporaneous transmissions of the same record into one 'act'" is appropriate. *Id.* at 618 (ATF agent's fax to 4500 other agents was a single act meriting only one $1,000 recovery). Class-action litigation under the Act has proven unsuccessful largely because of the need for each plaintiff to demonstrate an "adverse effect" caused by a violation of the Act. Indeed, in one case cited by the government — *Schmidt v. Department of Veterans Affairs*, No. 00-C-1093, 2003 WL 22346323 (E.D. Wis. Sept. 30, 2003) — the district court held that Section

552a(g)(4)(A) permits a $1,000 statutory damages award that does not depend on proof of actual damages. *Id.* at *16. The court nonetheless refused to certify a class on the ground that each individual would have to prove he "suffered an adverse effect as a result of the VA's failure to comply with [the Act]." *Id.* at *18; *see also Lyon v. United States*, 94 F.R.D. 69, 76 (W.D. Okla. 1982) ("In Privacy Act damages actions, questions affecting only individual members greatly outweigh questions of law and fact common to the class.").

CONCLUSION

For these reasons, and for the reasons stated in Petitioner's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

DONALD B. AYER
JACK W. CAMPBELL IV
(Counsel of Record)
DOMINICK V. FREDA
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001-2113
(202) 879-3939

JOSEPH E. WOLFE
TERRY G. KILGORE
WOLFE, WILLIAMS
& RUTHERFORD
470 Park Avenue
Norton, VA 24273-0625
(276) 679-0777

Counsel for Petitioner

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